

PATENTS AND TRUSTS

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PATENTS AND TRUSTS

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PATENT RIGHTS

WITH REFERENCE TO UNITED STATES AND STATE ANTI-TRUST LAWS.

The following chapters constitute a brief resume and discussion of federal cases involving the authority and extent to which anti-monopoly statutes may affect patent rights. A list is given of such cases decided up to April 1, 1909.

Most of the litigated cases in the list given have not involved the construction of anti-monopoly statutes in themselves but such a list may be useful in determining to some extent the result of any attempts to employ patent rights as an industrial weapon by the industrial trusts.

CHAPTER I.

The authority of the United States to pass legislation against combinations in restraint of trade arises from Section 8 of the Constitution of the United States: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This authority was exercised July 2nd, 1890, in the enactment of the so-called SHERMAN ANTI TRUST ACT, Chapter 647, U. S. Comp. Stat. 1909, page 3200. The text of the act is as follows:

An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize,

olize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

Whatever the application of the Sherman Law to patented articles may be, it is obvious that the jurisdiction of the Sherman Law is limited to only a single feature of the patent grant, namely *vending*. The authority of the Sherman Law is limited strictly by that section of the constitution out of which it arises that is "to regulate commerce with foreign nations and among the several states and with the Indian tribes." Therefore the mere *use* or *manufacture* of a patented article or a combination or monopoly affecting only the manufacture or use of articles patented or unpatented could not come under the jurisdiction of the Sherman law. Agreements therefore tending to restrain only the manufacture of a patented article or to secure a monopoly in articles patented or unpatented provided such agreements did not extend to the *sale* of such articles in interstate commerce would not come within the Act.

This has been definitely decided in the case of U. S. vs. E. C. Knight Co., 156 U. S. 1. This was an action to dissolve the so-called Sugar Trust which had acquired by exchange of the shares of its own stock four Philadelphia refineries and was in nearly complete control of the manufacture of refined sugar in the United States; it was the Government contention that the contracts under which these purchases of stock were made constituted combinations in restraint of trade or commerce in refined sugar among the several states and with foreign nations and it asked the cancellation of the contracts and the redelivery of the stock. It was held by the Supreme Court however, that conceding a monopoly so created, it was a monopoly in the manufacture of sugar and not in its sale or distribution among the several states. If a monopoly in interstate commerce followed a monopoly in production, it was but indirect and incidental and not within the prohibition of the Anti Trust Law. The chief Justice in his decision said: "Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power

may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy."

The Northern Securities case 193 U. S., 197, is also in point. In his dissenting opinion, Mr. Justice White said: "The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate Commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all."

THE SHERMAN ANTI TRUST LAW AND PATENTS.

Considerable authority will be found for the proposition that any contracts involving patented articles exclusively are outside of the jurisdiction of the Sherman Act. This is expressed very pointedly in the case of Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., 154 Fed. 508 in which Judge Baker said: "Use of a patented invention can not be had except on the inventor's terms, and the requirement that a licensee join other licensees in a combination or pool to control the prices and output in an innocuous patented article is not in violation of the Sherman Anti Trust Act of July 2nd, 1890, (26 Stat. 209 c 647) U. S. Comp. St. 1901, p. 3200). Patented articles unless and until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states within the meaning of such act, because they are not articles in which the people are entitled to freedom of trade."

"Under its constitutional right to regulate interstate commerce, Congress made illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, and subjected to liability to fine or imprisonment every person who shall monopolize, or attempt to monopolize or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. Congress, having

created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public, the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman Law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subjects of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial, the result is the criterion. The test of violation of the Sherman Law is whether the people are injured, whether they are deprived of something to which they have a right. *Northern Securities Co. v. United States*, 193 U. S., 197, 24 Sup. Ct., 426, 48 L. Ed., 679."

To construe this rendering of the law strictly would be to affirm that patented articles provided that they had not been released by the owner of the patent from the dominion of his monopoly, are never amenable to any laws against contracts in restraint of trade. This argument taken literally would mean that contracts governing patented articles solely would not be affected by anti-trust laws. It is believed that this implication arises not from the intention of the author of the decision but rather from the confusion of the term "patented article" with the term "patented articles." The argument that the "the use of a patented invention can not be had except on the inventor's terms, and the requirement that a licensee join other licensees in a combination or pool to control the prices and output in an innocuous patented article is not in violation of the Sherman Anti Trust Act of July 2nd, 1890," is unassailable, but the remainder of the proposition in the same paragraph that patented articles are not articles in which the people are entitled to freedom of trade is open to grave objections. The extent of the patent monopoly is determined by the patent grant which is the exclusive right to make, use and vend the patented article. That this right gives an indefinite right of making contracts without bounds in respect to patented articles is very disputable as apart from the rights conferred in the patent, the people are entitled to freedom of trade in such articles. The fallacy lies in the assumption that the exclusive right to make, use and vend includes within its boundaries all the rights of commerce or that the right to make, use and vend is as broad as the freedom of trade itself. It is believed that the correct rule is more accurately stated by Judge Brown in the case of *Blount Mfg. Co. vs. Yale & Towne Mfg. Co.*, 166 Fed. 555: "While it is the ordinary privilege of the owner of patent rights to use or not to use them

without question of motive the grant of letters patent confers upon the patentee no right not to use his invention, or to make an agreement in restraint of trade in that article, save in connection with an assignment of the rights conferred by letters patent. The proposition that an agreement not to manufacture, or to restrain trade, is within some rights of nonuse conferred upon a patentee, seems unsound if we consider the nature of the grant of letters patent. The right of a patentee or of his assignee to withhold the invention is quite apart from any grant contained in the letters patent. The privilege of restraining others is granted to the owner of letters patent. He is given no right or privilege to restrain himself. By the terms of the patent he has the exclusive right to make, use and vend. The right to make, use and vend he has without the grant of letters patent. When we say that a patent grants an "exclusive right" we do not mean that the right to make, use and vend is granted, but only that the patentee's existing right is made exclusive by the grant."

The case of *Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co.*, 148 Fed. 21 is also in point.

"Conceding that a number of patents relating to the same art may be united by purchase in the same ownership, and that the grant of combination licenses thereunder on condition specified may be within the lawful monopoly given by the patent law, yet to be immune from the operation of Anti-Trust Law of July 2nd, 1890 c, 647, 26 Stat. 209 (U. S. Comp. St., 1901, page 3200) the contract must be referable solely to the inventions under the patents, and intended to secure a monopoly in the beneficial use of specific inventions only; and where it extends beyond such purpose, and is intended to create a monopoly in the manufacture of the article to which the patent relates by securing and holding for the benefit of the parties all patents relating thereto under which such manufacture may be carried on, and not for the protection of patent rights, may constitute a conspiracy and combination in restraint of trade in violation of the law.

The right of the owner to purchase and enjoy other patent privileges by way of investment or increase of royalties, together with all other recognized property rights therein, except the exclusive use of each invention conferred by the grants, are held alike with the rights common to other property owners to make them profitable. So, the nature of the patent privilege confers no immunity to combine with other patentees or under other patents in a confederation of users, when such combination is prohibited generally as in the terms of the anti-trust act. While purchase alone of the outstanding patents, interfering or non-interfering, by the complainant, might be within his rights, the combination which was entered into, with that as one of its means, as I believe, violated the law."

The contrary view is implied in *Cilley vs. United Shoe Mfg. Co.*, 152 Fed. 726:

"If the defendants' contracts with manufacturers are based upon patent rights, this part should appear, because contracts with respect to patents are, as a general rule, outside the doctrine of restraint of trade, both at common law and under the federal Statute."

To sustain the view that patent contracts are not within the jurisdiction of the Sherman Act may also be cited *John D. Park & Sons Co. vs. Hartman*, 153 Fed. 27 in which it is stated:

"That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the Act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled. *Heaton Peninsular Button Co. vs. Eureka Spec. Co.*, 77 Fed. 288, 25 C. C. A., 267, 35 L. R. A., 728, *Dickerson v. Tinling*, 84 Fed. 192, 28 C. C. A., 139, *Edison Phonograph Co. vs. Kauffman*, (c c) 105 Fed. 960, *Edison Phonograph Co. vs. Pike* (c c) 116 Fed. 863, *Rupp et al. vs. Elliott*, 121 Fed. 730, 65 C. C. A., 544, *Victor Talking Machine Co. vs. The Fair*, 123 Fed. 423, 61 C. C. A., 58; *Bement vs. National Harrow Co.*, 186 U. S., 70, 22 Sup. Ct., 747, 46 L. Ed., 1058."

To sustain a view contrary to the *Rubber Tire Co. vs. Milwaukee Rubber Works Co.* and *Park & Sons Co. v. Hartman* above cited, the following cases may be mentioned: *National Harrow Co. vs. Quick*, 67 Fed. 130, *National Harrow Co. vs. Hench*, 83 Federal 36, *National Harrow Co. vs. Bement*, 186 U. S. 92, *Bobbs-Merrill Co. vs. Straus*, 139 Fed. 155, *State of Missouri vs. Bell Telephone Co.*, 23 Fed. 540, *Edison Electric Light Co. vs. Sawyer*, 53 Fed. 598; in the case of *National Harrow Co. vs. Bement*, it is plainly stated that although the contracts in controversy refer to patented articles yet "the licenses as issued by their terms and by their plain meanings refer to, include and provide for interstate as well as other commerce."

The opinions of Judge Grosscup in *Rubber Tire Wheel Co. v. Milwaukee Co.*, 154 Fed. 362 and *Indiana Mfg. Co. vs. J. I. Case Co.*, 154 Fed. 366 are important as indicating the exact line of demarcation between contracts covering patented articles which are and which are not subject to the interfering hand of the Sherman law. In these two cases respectively, he says:

"I concur in the foregoing judgment; but am not prepared to hold that the patented articles are never, under any circumstances, articles of trade or commerce among the several states, within the meaning of the Sherman Act; and do not think the premise is essential to the conclusion arrived at."

"The ground on which I wish to put my concurrence so far as the case involves the Sherman Act, is this: The Buchanan patent is a true combination patent, of which the Nethery and Landis patents are improvements only and subsidiary thereto—so much so that they

could not have been put into practice except by infringement of the Buchanan Patent. The patents as an entirety, therefore, constitute a single mechanical evolution—are blossoms from the same trunk—and in no sense are competitive patents; from which it follows that their concentration in one control is in no sense a combination to prevent competition. I state this as my view because I am not prepared to hold—as I have said already in a concurring opinion in *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Company*—that patented articles are never, under any circumstances, articles of trade or commerce, within the Sherman Act.”

The Sherman law does not refer to the monopoly conferred by patents and it is plain that no part of the patent Statutes is repealed thereby. The justifiable inference is that the Sherman law would be applicable in all cases of combinations in restraint of trade where the combination in restraint of trade was not permitted by the nature of the patent grant. That many contracts covering patented articles exclusively may be outside of the patent grant and amenable to the ordinary laws against combinations in restraint of trade is a proposition which will be further developed in succeeding pages.

CONTRACTS GOVERNING PATENTED ARTICLES AND STATE ANTI-MONOPOLY LAWS.

How jealously the courts have guarded the patent grant as an exclusively federal prerogative, not to be encroached on by any local legislation may be deduced from the decision in *Hollida v. Hunt*, 70, Ill., 109 where it was held that a state statute which required promissory notes given for patent rights to express such consideration on their face, was invalid on the ground that such a statute served as a limitation of the right to sell the patented article in whatever jurisdiction the patent grant might extend.

Many states have passed laws against monopolies and combinations in restraint of trade which by their terms would cover contracts in restraint of trade in patented articles. The Anti-monopoly statute of Illinois will serve as an example.

“If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust agreement, combination confederation or understanding with any other corporation, partnership, individual, or any other persons or association or persons to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article commodity or merchandise to be manufactured, mined, produced

or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to indictment and punished as provided in this act."

Starr & Curtis's Rev. Stat. of Ill. Chap. 38, Sec. 50.

That such state statutes can not in any way abridge the patent grant has been uniformly decided. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 508, *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302; *United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364. In the case of the *Rubber Tire Wheel Co.*, it was said: "The Wisconsin statute is eliminated not only because it is not involved in any assignment of error, but also because a state can not substract from the right conferred upon a patentee and his assigns by the federal laws." In the case of the *United States Seeded Raisin Co.* it was also stated that rights acquired under the patent laws of the United States can not be effected by a state statute.

The following is from *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302.

"The corporation organized for the purpose of acquiring patents and granting licenses thereunder, and which has acquired many, if not all, of the valuable patents covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois, for to subject patents to the operation of State laws of this description would be inconsistent with the rights acquired under the patent laws. *Harrow Co. v. Quick*, 67 Fed. 131 disapprove *Edison Electric Light Co. v. Sawyer Man Electric Co.*, 3 C. C. A., 605, 53 Fed. 592; *Strait v. Harrow Co.*, 51 Fed. 819; and *Soda Fountain Co. v. Green*, 69 Fed. 333 followed."

But although the decisions are unanimous as to the inability of a State Statute to effect the patent GRANT, yet the individual states in pursuance of their right to regulate commerce within their own borders have passed statutes which have in various ways effected trade in patented articles and such statutes where otherwise within the powers of the state's legislative functions, have been held constitutional. *Patterson vs. Kentucky*, 97 U. S., 501 is the pioneer of this class of cases. In that case the appellant had been convicted in a state court of selling an improved burning oil of which he was the inventor and which had been condemned by the State Inspector as unsafe.

The appellant claimed the right to sell the same by virtue of the letters patent issued to him on the oil. Mr. Justice Harlan stated: "The right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power, with which the states have never parted, and so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." The case of *Jor-*

dan vs. Overseers, 4 Ohio 295 may also be quoted in the same connection.

Obviously the power of the state in making laws for its own citizens would extend to the prohibition of the use of any device or machine which it was unlawful to use although the same were patented as for instance the use of a gambling device, the use of a medical device which might be held unlawful by a state statute, a process for making oleomargarine which the state laws might make it illegal to sell or the use of a patented machine which the factory laws might condemn as unsafe.

The class of cases operating to restrict patent rights more specifically than in the comparatively limited class of cases above mentioned are the series of cases in which it has been held that a public service corporation which furnished its service to one company with the consent of its licensor can not refuse to furnish like facilities to all other similar companies notwithstanding it is forbidden to do so by its contract with the owner and licensor of the patent. The basis of these decisions is that where the patent is used for a public purpose the patentee or his assigns can not exclude any portion of the public from the benefit of it for the reason that as public servants or common carriers the public service corporation is required to treat all members of the public alike. These cases arose on the refusal of a public telephone company which had furnished its facilities to one telegraph company, refusing to furnish like facilities to other telegraph companies on the plea that it was forbidden to do so by its contract with the owner of the patented instruments used in its service. The cases were the following: Commercial Union Telegraph Co. vs. N. E. Telephone & Telegraph Co., 61 Vermont 241, State *ex rel.* vs. Telephone Co., 36 Ohio St., 296, D. & A. Telephone & Telegraph Co. vs. Delaware, 50 Fed. 677, State vs. D. & A. Telephone & Telegraph Co., 47 Fed. 633, State of Missouri vs. Bell Telephone Co., 23 Fed. 540. The following is from 50 Fed. 677: "A Delaware Telephone Company which furnished facilities to the Western Union Telegraph Company for the transmission of telegraphic messages can not be excused from furnishing like facilities to other telegraph companies because its license to use the telephones is expressly subject to an exclusive license in favor of the Western Union Company for the transmission of telegraphic messages; for such exclusive license creates a monopoly, and is void under the Delaware law." The following is from the case of State vs. Delaware & A. Telephone & Telegraph Co., 47 Fed. 633: "Respondent alleged that it was a mere licensee of the owner of patents for the telephones; that it was forbidden by the terms of its license to supply a telephone instrument to any telegraph company, to be used for telegraphic purposes, without the consent of its licensor; and that it had furnished a telephone to such other telegraph company, under a general order from the owner of patents in pursuance

of a contract between such owner and such telegraph company for exclusive license to the latter for a term of years to use the telephone in receiving and transmitting messages. Held, that this was no justification for the refusal to comply with the demand of relator, such contract being void as against public policy. The patented device having been employed for a public use, by a common carrier, in the prosecution of its business, relator was entitled to use it on the same terms as others in the same class."

"The conclusions drawn from an examination of these cases is that the patent laws give to the patentee a monopoly in his invention, and afford him protection in its power and legitimate employment but that they do not authorize him to employ it for a purpose or in a manner that may be forbidden to all other persons in the use of their unpatented property or discoveries. Since the above decisions were made, the telephone patents have come into general use, and the telephone as an instrument for the rapid transmission and reception of messages, has been adopted by all classes of persons, in almost every department of business, public and private and is now, within the scope of its power as essential to the commerce and welfare and the public as are the railroad and telegraph."

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CHAPTER II.

INDUSTRIAL COMBINATIONS OR TRUSTS AS PARTIES IN PATENT SUITS.

When the Issue of an Unlawful Combination is Not Pleadable.

The patent grant confers the exclusive right to make, use or vend the patented article and no feature of the monopoly conferred by patents has been more emphasized than that of EXCLUSION, that is excluding all others but the patentee or his assigns from the field covered by the patent. Regardless, therefore of the status of the owner of the patent, whether he be an individual with full capacity to contract or an unlawful corporation, no outsider has a right to make, use or vend the structure included in the patent grant. In suits for the infringement of patents, the courts have therefore uniformly refused to consider the plea of the defendant that plaintiff was an unlawful corporation, where defendant stood in no contractual relation to plaintiff in respect to said patent. The plea that since plaintiff is an illegal combination, it is therefore not entitled to a decree in a suit for infringement of a patent owned by it can not be availed of in a collateral proceeding. The cases, which are quite unanimous on this point, are as follows: Lafayette Bridge Co. vs. Streator, 105 Fed. 732, Edison Electric Light Co. vs. Sawyer, 53 Fed. 598, Otis Elevator Co. vs. Geiger, 107 Fed. 131, American Soda Fountain Co. vs. Green, 69 Fed. 333, Brown Saddle Co. vs. Troxel, 98 Fed. 620, National Folding Box & Paper Co. vs. Robertson, 99 Fed. 986, Cilley vs. United Shoe Machinery Co., 152 Fed. 726, General Electric Co. vs. Wise, 119 Fed. 922. The following citation from Brown Saddle Co. vs. Troxel is representative of all these cases: "Secondly the averment that the complainant is part of a combination or trust is irrevelant and impertinent, for the reason that it is no ground for denying relief for continued trespass by a third person upon the property of the complainant. The fact that a corporation is part of an illegal combination or trust can not justify the spoliation of the property which belongs to it by third persons. It is merely seeking by its bill to preserve its rights in its own property. What it may do with that property, or is doing with property can not deprive it of its right to invoke the protection of the court against trespass and infringement. The exceptions are sustained."

Industrial Combinations or Agreements in Patent Suits held Unlawful.

The following cases represent instances of combinations or agreements respecting patent rights which have been held unlawful: National Harrow Co. vs. Quick, 67 Fed. 130, National Harrow Co. vs. Hench, 83 Fed. 36, National Harrow Co. vs. Hench, 76 Fed. 667, Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co., 148 Fed. 21, Strait vs. National Harrow Co., 18 N. Y. Supplement 224, Elount Mfg. Co. vs. Yale & Towne Mfg. Co., 166 Fed. 555. Of the same purport though a case involving copyright and not patent rights is Bobbs-Merrill Co. vs. Straus, 139 Fed. 155, Bobbs-Merrill Co. vs. Straus, 210 U. S. 339. The cases of National Harrow Co. vs. Quick, National Harrow Co. vs. Hench and Strait vs. National Harrow Co., were all either modified or overruled by the case of National Harrow Co. vs. Bement, 186 U. S. 93. The case of Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co. was reversed by the Circuit Court of Appeals as reported in 154 Fed. 366.

At the present time, therefore the case of Blount Mfg. Co. vs. Yale & Towne Mfg. Co., stands practically alone as an instance of a contract dealing with patent rights declared illegal as in restraint of trade.

Industrial Agreements or Combinations in Patent Suits Held Not Unlawful.

With the exception of the case of Blount Mfg. Co. vs. Yale and Towne Mfg. Co., the trend of the decisions to date has been to sustain all contracts covering the sale of patented articles where these contracts embraced licenses to manufacture or sell the patented articles regardless of the tendency of such contracts to restrain trade, raise prices or to secure a monopoly in such patented articles. In these cases it has been generally held that any conditions respecting the manufacture or sale of patented articles which are made a part of the license agreement under which such articles are made or sold are legal notwithstanding that they may effect interstate trade or commerce or that they may tend to create a monopoly. What may be stated as the pioneer case of this class of cases is National Harrow Co. vs. Bement, 186 U. S., 93. The other cases which may be cited in connection therewith are Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co., 154 Fed. 366, Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., 154 Fed. 508, Goshen Rubber Works vs. Single Tube A. & B. Tire Co., 166 Fed. 431.

Discussion of the Litigated Cases.

A natural inquiry arising from an examination of the litigated cases is this: Is there any guiding principle discernible in these cases by

which it may readily be ascertained in the future whether a given contract concerning patent rights is legal or not?

From the drift of the decisions, it might be concluded that almost any combination of patent licenses was legal but it is believed that the concurring opinion of Judge Grosscup in the case of *Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co.*, 154 Fed. 366 here given and the opinion of Judge Brown in the case of *Blount Mfg. Co. vs. Yale & Towne Mfg. Co.*, 166 Fed. 555 indicate the bounds of such licenses.

Judge Grosscup said: "The ground on which I wish to put my concurrence, so far as the case involves the Sherman Act—. The patents as an entirety therefore constitute a single mechanical evolution, are blossoms from the same trunk and in no sense are competitive patents, from which it follows that their concentration in one control is in no sense a combination to prevent competition."

Judge Brown in his opinion said: "A contract whereby the manufacturers of two INDEPENDENT patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition and creates a restraint of trade which results not from the granting of letters patent but from agreement."

Hitherto, the patent grant has acted as a kind of charmed circle which rendered any contract made under the ostensible employment of such grant, legal. To extend such a rule indefinitely would require only the use of any patent however weak or invalid were its claims to cover the subject-matter of the contract, to allow the parties to the contract to avoid any possible opposition to their plans by reason of the Sherman Act.

It is for instance apparent that a license to manufacture under a patent which by its terms did not refer to the article to be manufactured would not save a contract which was otherwise contrary to the terms of the Sherman Act. Many contracts having to do with patent rights are entered into for the purpose of compromising pending patent litigation but it does by no means follow that any pending litigation would offer a sufficient consideration for such a contract so as to empower the parties to make any license agreement they chose.

It would seem that such a license agreement to be valid would require that each article manufactured by each of the parties would have to be referable in its construction to some patent or patents owned by one or more of the parties to such agreement. In the case of *Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co.*, 154 Fed. 366, Judge Baker said:

"The proposition is that the public is entitled to competition between independent inventions. The linotype and the monotype inventions are referred to as illustrating machines that produce the same result by using different means and modes of operation. If Buchanan had invented the linotype—. Would he by conferring upon the public the advantage of that disclosure be barred of the right to make or buy

the monotype invention. We do not understand counsel for appellee to say "yes" squarely. But their contention comes to this; if he owneth either alone, over that he would have complete dominion; owning both he controls nothing. The public has no right in either invention, therefore the public has the right to have them both in the market competing for buyers. Naught plus naught; the sum of two naughts is a substantive quantity." This question was practically answered in the Northern Securities Case, 201 U. S. by Judge Brewer as follows: "Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not, by any act of Congress, be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens had, of purchasing Northern Pacific stock, could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in Pearsall vs. Great Northern Railway Co., 161 U. S., 646, 40 L. Ed., 838, 16 Sup. Ct. Rep., 705, in which this court said (page 671, L. Ed. page 847, Sup. Ct. Rep., 712), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company. Doubtless these stockholders could lawfully acquire, by individual purchases, a majority or even the whole of the stock of the organized company and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interest as such, in common.

But no such investment by a single individual of his means is here presented. There was a combination of several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purpose as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person created and existing only for the convenient transaction of business. In this case, it was a mere instrumentality by which separate railroad properties were

combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out."

In *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pennsylvania 173 it is also stated "Men can often do by the combination of many what, severally, no one could accomplish, and even what, when done by one, would be innocent. There is a potency in numbers when combined which the law can not overlook, where injury is the consequence."

It is therefore probable that while Buchanan might have invented the linotype and after such invention bought the monotype; yet it does not follow from this that any combination by which the monotype and linotype patents were merged in a single control would be legal. It is fairly possible that if the financial genius of Edison had been equal to his inventive ability, that he might have at this day personally controlled a much greater number of electrical inventions than are now controlled by any single corporation; yet it does not follow from this that the merger of any number of electrical inventions in one ownership for the purposes of monopoly, would be innocent.

In view of the popular current interest in a so-called "electrical trust," this is a relevant consideration. While Mr. Edison's legitimate earnings as an inventor might have given him the control of the electrical industries of the country, it does not therefore follow that any combination of electrical corporations effecting a similar result, would be equally lawful.

Aseltine Lake + Co.

CHAPTER III.

SOME HYPOTHETICAL CASES WITH RULES DEDUCIBLE THEREFROM.

In the cases already litigated of contracts concerning patent rights, the principles of law governing such cases have been somewhat obscure for the reason that a totally different state of facts has been presented in each case and the relation of the patents named in the contracts to the articles manufactured under such contracts has usually not been clearly established in the decisions. For these reasons, it has seemed desirable to present a series of hypothetical cases in which a readily classifiable state of facts was assumed so that the principles of law derivable therefrom could be more readily ascertained. It is believed that such a method may be of assistance in the examination of future cases on this subject.

Case I.

Facts.

A is a manufacturer of unpatented shovels in Maine.

B is a manufacturer of unpatented shovels in Massachusetts.

C is a manufacturer of unpatented shovels in Ohio.

A, B and C each agree not to sell their product in a number of states where the product of either one of the others is sold. This agreement is clearly illegal and is in fact submitted as an example of the simplest statement of a contract which is illegal under the Sherman Anti-Trust Act. A rule governing this class of cases might be briefly stated as: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE OR COMMERCE IN UNPATENTED ARTICLES, IS ILLEGAL.

Case II.

Facts.

A is a manufacturer of unpatented shovels in Maine.

B is a manufacturer of unpatented shovels in Massachusetts.

C is a manufacturer of shovels made under his patent in Ohio.

A, B and C agree not to sell their product in certain states where the product of either of the others is sold. Although in this contract the patented article made by C is involved, yet it is evident that the patent monopoly enjoyed by C is in no way involved in the contract

and that it presents no other elements than the conditions given in Case I. It might indeed be argued that C being the owner of a patent under which his shovels are made has a right to sell or not to sell his product wherever he pleased, but as the contract had no reference whatever to the patent except to name the product that C sells and as the patent is in no way involved to enhance the price of the patented article, the whole contract entered into by A, B and C, is illegal. A rule derivable from the above state of facts might be stated as follows: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED AND UNPATENTED ARTICLES, IS ILLEGAL.

Case III.

Facts.

A is a manufacturer of unpatented shovels in Maine.

B is a manufacturer of shovels under patent y owned by him in Massachusetts.

C is a manufacturer of shovels under patent z owned by him in Ohio.

A, B and C agree not to sell their product in certain states where the product of either of the others is sold. The above case is the same as the preceding except two of the manufacturers manufacture a patented article and one of the manufacturers involved manufacture an unpatented article. It is clear that this agreement is not made with any relevancy to the patent monopoly conferred on two of the manufacturers but is only an ordinary agreement to avoid competition and is in effect the same agreement mentioned in Case I. The contract, therefore is illegal and a rule derivable therefrom may be restated as in the preceding case: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED AND UNPATENTED ARTICLES, IS ILLEGAL.

The reader will observe that in the two preceding cases it has been assumed that patented articles in certain cases do compete with unpatented articles. This may seem obvious but in view of the statement in *Indiana Mfg. Co. v. J. I. Case Co.* that the public is not entitled to competition in patented articles, the point is here mentioned.

Case IV.

Facts.

A is a manufacturer in Maine of patented shovels made under patent x which is owned by him.

B is a manufacturer in Massachusetts of patented shovels made under patent y which is owned by him.

C is a manufacturer in Ohio of patented shovels made under patent z which is owned by him.

Patents x, y and z do not conflict, that is, the constructions covered in each patent do not infringe each other. A, B and C assign the patents x, y, and z respectively to a company formed by them in consideration of such assignment the company licenses A to make shovels under the x patent exclusively, licenses B to make shovels under the y patent exclusively and licenses C to make shovels under the z patent exclusively. In further consideration of these licenses, A, B, and C agree not to sell their goods except in certain states specifically mentioned in the license, so that the product of either A, B and C will not be sold in the territory assigned to any of the others. It is clear that though this contract is made in connection with the assignment of patent rights that it is an illegal contract as the assignment of a patent right was only collateral and incidental to the agreement proper which was an ordinary agreement by competitors in restraint of trade. The foregoing case would come well within the rule stated by Judge Brown in the case of *Blount Mfg. Co. vs. Yale & Towne Mfg. Co.*, "When a patentee agrees, however to restrain his own trade in the article of his own invention, not as an incident to a granting of rights, but for the purpose of enhancing his price by the removal of competitors, he is then quite outside the sphere of any right granted him by the Government. He may engage in that trade, he is subject to all restrictions upon interstate traders." Several adjudicated cases could, however, be brought forward to support the contention that the foregoing agreement was a legal one. In the case of *Indiana Mfg. Co. vs. J. I. Case Threshing Machine Co.*, 154 Fed., 366, Judge Baker said: "Another attack is predicated upon the number of patents. The proposition is that the public is entitled to competition between independent inventions. The linotype and the monotype inventions are referred to as illustrating machines, that produce the same result by essentially different means and modes of operation. If Buchanan had invented the linotype, the patent laws would have given him a monopoly, not a lesser right conditioned upon his giving the public the benefit of the invention in a way some chancellor might deem equitable (*Fuller vs. Berger*, 120 Fed. 274, 56 C. C. A., 588, 65 I. A. A., 381, denying the doctrine of *Hoe vs. Knap* (cc) 27 Fed., 204,) but an absolute monopoly, an unqualified right to deprive the people of its use for seventeen years (and the writ of injunction of course affords the only possible way) or to make them pay his price in the meantime. Would he by conferring upon the public the advantage of that disclosure be barred of the right to make or buy the monotype invention. We do not understand counsel for appellee to say 'yes' squarely. But their contention comes to this: If he owneth either alone, over that he would have complete dominion; owning both, he controls nothing. The public has no right in

either invention, therefore the public has the right to have them both in the market competing for buyers. Naught plus naught; the sum of two naughts is a substansive quantity." In the Rubber Tire Wheel Case, 154 Fed., 508, it was also stated: "Patented articles unless and until they are released by the owner of the patent from the dominion of his monopoly are not articles of trade or commerce among the several states within the meaning of such act, because they are not articles in which the people are entitled to freedom of trade." It is believed that this ruling results from the confusion of the term patented article with the term patented articles. Undoubtedly patented articles severally unless and until they are released by the owner of the patent from the dominion of his monopoly are not articles of interstate trade or commerce but this does not mean that the owners of patented articles are given an unrestricted freedom of contract in respect to the sale of such articles merely because of a patent grant incidentally connected with their manufacture. With the exception of the monopoly specifically limited by the language of the patent grant consisting of the exclusive and assignable right to make, vend and use the patented article, the people are entitled to freedom of trade in patented articles. A rule derivable from the above state of facts may therefore be stated as follows: A CONTRACT IN RESTRAINT OF INTERSTATE COMMERCE, TRADE OR COMPETITION BETWEEN PATENTED ARTICLES WHERE NONE OF THE PATENTED ARTICLES INFRINGE EACH OTHER, IS ILLEGAL.

Case V.

Facts.

A is a manufacturer in Pennsylvania of armor plate covering process and product under patent (*l*) which is owned by him.

B is a manufacturer in New Jersey of nickel steel under patent (*m*) covering process and product, which is owned by him.

C is a manufacturer in New York of manganese steel under patent *n* covering process and product, which is owned by him.

A, B and C by reason of the trade monopoly in their respective fields, each have a very profitable business but each intends to extend the scope of their plants into other fields. A starts to manufacture and sell an unpatented steel to compete with B's nickel steel. B starts to manufacture and sell an unpatented bearing metal which is used for the same purpose as C's manganese steel. C starts to manufacture and sell an unpatented armor plate which is claimed to be of equal merit to A's armor plate. Prices in the steel trade are therefore demoralized and in order to render the market more stable, A, B, and C assign their respective patents *l*, *m* and *n* to the Q Steel Co., which gives A an exclusive license to manufacture armor plate under

patent l but A agrees in consideration of said license to manufacture and sell in the United States no other steel product but armor plate. The Q Steel Co. grants B an exclusive license under patent m to make nickel steel in consideration of which B agrees to make or sell no other product in the United States but nickel steel. The Q Steel Co. further grants to C an exclusive license under patent n to make manganese steel in consideration of which C agrees to make or sell no other product in the United States but manganese steel under said license.

The above case constitutes an instance of the restraint of interstate trade and commerce in unpatented articles by reason of license agreements but which cover the manufacture of patented articles solely. It is seen that such an agreement as above outlined while purporting to convey licenses to manufacture under certain patents is really an agreement to restrict manufacture and competition between patented articles and unpatented articles and the restraint is exercised solely on unpatented articles. Under the conditions as given, such a contract or combination would be illegal but it is probable that if the above agreement contained no mention of the sale of the manufactured articles but concerned itself only with the manufacture of patented or unpatented articles and not with their disposition after manufacture, that it would be legal. This would be to follow the precedent in *U. S. vs. E. C. Knight Co.*, 156 U. S., 1 where it was held that a combination of manufacturing enterprises which tended to constitute a trust was not illegal as the effect of such a combination on interstate trade or commerce as such was not direct, but remote. A rule derivable from this case would be a restatement of the rule given in Case I: A CONTRACT IN RESTRAINT OF INTER-STATE TRADE COMMERCE OR COMPETITION BETWEEN UNPATENTED ARTICLES OR BETWEEN PATENTED AND UNPATENTED ARTICLES, IS ILLEGAL.

Case VI.

Facts.

A is a manufacturer in Pennsylvania of armor plate covering process and product under patent l which is owned by him.

B is a manufacturer in New Jersey of nickel steel under patent m covering process and product, which is owned by him.

C is a manufacturer in New York of manganese steel under patent n covering process and product, which is owned by him.

A secures by purchase patent f covering a new nickel steel and process of making same. B secures by purchase patent h for a new bearing metal covering also the process of making same. C secures by purchase patent g for a new armor plate and the process of making same. Patent f does not infringe any patent of B or C. Patent

g does not infringe any patent of A or B. Patent h does not infringe any patent of A or C.

A begins the manufacture of the new nickel steel covered under patent f. C begins the manufacture of the new armor plate covered in patent g and B begins the manufacture of the new bearing metal covered in patent h. The result is that the market in the United States for nickel steel, for armor plate and for bearing metal becomes demoralized and in order to render the market more stable and for mutual considerations A, B and C assign their patents, l, f; m, h; and n, g to the Q Steel Co. which grants to A an exclusive license to manufacture armor plate under patent l in consideration of which A agrees to suppress patent f and not to manufacture nickel steel thereunder or to allow others to do so. The Q Steel Co. also grants to B an exclusive license to make nickel steel under patent m in consideration of which B agrees not to use patent h or to allow any bearing metal to be made thereunder. The Q Steel Co. also grants to C an exclusive license to make manganese steel under patent n in consideration of which C agrees not to use patent g or to allow any other firm to make armor plate thereunder. It will be noted that the above contracts have reference only to the manufacture of articles under patents and not to their sale and it is therefore believed that as the above agreements contain no reference to interstate trade or commerce that same would not be in contravention of the Sherman Act. It is believed that if the contracts referred to interstate trade or commerce that they would be illegal notwithstanding the fact they covered patented articles exclusively but it is not seen in view of the decision in the case of U. S. vs. Knight, 156 U. S., how a contract for the manufacture alone of patented articles, regardless of the extent of which such contract might actually restrict competition, could be unlawful under the terms of the Sherman Act. It is believed that a contract such as given in Case VI might be amenable to certain State Statutes against combinations but it is not believed that it would be a violation of the terms of the Sherman Act. A rule derivable from the foregoing state of facts may be stated as follows: A CONTRACT IN RESTRAINT ONLY OF THE MANUFACTURE OF PATENTED ARTICLES IS NOT IN VIOLATION OF THE TERMS OF THE SHERMAN ANTI-TRUST ACT WHETHER A LICENSE AGREEMENT FOR THE MANUFACTURE OF SUCH PATENTED ARTICLES IS PART OF THE CONSIDERATION OR NOT.

Asceltine Lake

Case VII.

Facts.

A is a manufacturer in Maine of patented shovels under license from patentee D.

B is a manufacturer in Massachusetts of patented shovels under license from patentee D.

C is a manufacturer in Maine of patented shovels under patent z owned by him.

The patent of D and the patent z do not conflict with each other.

For convenience in selling, A, B, and C agree to divide the United States into certain selling districts, a number of states being apportioned to each party in the contract, and each agrees not to sell their product in the territory of the other. It is plainly seen that the above contract is illegal, as it is an ordinary contract to prevent competition between manufacturers having the same market. The only reason this case is here presented is because in several litigated cases the statement is made that the public is not entitled to competition in patented articles. The case here presented shows the absurdity of such a plea as although all three of the articles made are patented, yet this does not negative the probability of there being active competition between patented articles in the same field as it is often possible to substitute one patented article for another which will perform the same function. A rule derivable from this case therefore may be stated as follows: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED ARTICLES NOT INFRINGING EACH OTHER IS ILLEGAL.

Case VIII.

Facts.

A is a manufacturer of patented shovels under royalty agreement with the patentee D in Maine.

B is a manufacturer of patented shovels under royalty agreement with the patentee D in Massachusetts.

C is a manufacturer of patented shovels under royalty agreement with patentee D in Maine.

The royalty agreement with D in no case provides for any restriction as to output.

A, B and C for convenience in marketing their product agree to apportion the United States as selling territory among themselves, a number of states to be the selling territory of each and neither of the others were to sell in the territory allotted to each party. It is plain again that this is a combination in restraint of interstate trade although it refers exclusively to a patented article made under a single patent.

If the restriction as to the territory in which the articles were to be sold were a part of the license agreement in each case with the patentee D, there is no doubt that the agreement would be legal. A rule derivable from the above case may be therefore stated as follows: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED ARTICLES MANUFACTURED UNDER THE SAME PATENT BUT WHERE SAID CONTRACT IS NOT A PART OF THE LICENSE AGREEMENT BY WHICH SAID ARTICLES ARE MANUFACTURED, IS ILLEGAL.

Case IX.

Facts.

A is a manufacturer of patented shovels under royalty agreement with the patentee D in Maine.

B is a manufacturer of patented shovels under royalty agreement with the patentee D in Massachusetts.

C is a manufacturer of patented shovels under royalty agreement with the patentee D in Maine.

The royalty agreement with D in no case provides for any restriction as to output.

The royalty agreement with D restricts the territory in which A, B or C shall sell their product; neither A, B or C being allowed to sell their product in any of the territory allotted to each of the others. This is an ordinary form of license agreement strictly within the terms of the patent grant, the restrictions as to trade being a part of the consideration under which the patent right is exercised. Whether such an agreement would be valid after the patent was declared invalid is an interesting question. In the case of Gloucester Isinglass & Glue Co. vs. Russia Cement Co., 54 Mass., 92 it was held that such an agreement was valid where a compromise of litigation was an important part of the consideration for such agreement and where the parties after the invalidity of the patent had been declared, by their conduct affirm and renewed the agreement. It is plain that an agreement purporting to be a license agreement under a patent which is incapable of conveying a monopoly of the right to manufacture all of the articles named therein and which is in restraint of trade would not be capable of avoiding the operation of any law against combination in restraint of trade. A rule derivable from the case here presented may be stated as follows: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED ARTICLES MADE UNDER THE SAME PATENT WHERE THE RIGHT TO MANUFACTURE UNDER THE PATENT IS INCLUDED IN THE CONTRACT, IS LEGAL.

Case X.

Facts.

A is a manufacturer in Maine of patented shovels under patent x which is owned by him.

B is a manufacturer in Massachusetts of patented shovels under patent y which is owned by him.

C is a manufacturer in Ohio of patented shovels under patent z which is owned by him.

A claims that the products of B and C are an infringement of his patent and starts suit against B and C on account of such alleged infringement. On the advice of counsel in order to settle the pending litigation A, B and C assign the patents x, y and z to the T. Patents Co. which issues an exclusive license to A to manufacture shovels under the x patent, in consideration of which A agrees to sell his product in certain mentioned states only. The T. Patents Co. also issues an exclusive license to B to manufacture shovels under the patent y in consideration of which B agrees to sell his shovels only in certain mentioned states. The T. Patents Co. further grants an exclusive license to C to manufacture under patent z in consideration of which C agrees not to sell his product except in certain mentioned states, where the products of A and B are not sold.

As the above hypothetical case is a good illustration of the formation of many industrial trusts and patent holding companies, it is an interesting question whether the T. Patents Co. is a lawful combination. It is assumed that the assignment of the patents x, y, and z to the T Patents Co. was in consideration of the agreements and license contracts afterwards executed as above. If the claim of A that the constructions shown in patents y, and z infringed patent x was only a colorable one for the purpose of bringing B and C into the combination and the patent x was incapable on its face of covering constructions shown in patents y and z, it is apparent that the various license agreements above enumerated were without consideration and that the above agreements could be amenable to any laws against combination in restraint of trade. Would such agreements be presumptively valid or invalid? It is thought that each patent would be held to be prime facie valid and if, from a judicial determination from the face of the patents it appeared that y and z infringed x that such agreements would be valid until a final determination of the question of validity of patents had been made. The only expression of a rule here ventured is as follows: A CONTRACT IN RESTRAINT OF INTERSTATE TRADE, COMMERCE OR COMPETITION BETWEEN PATENTED ARTICLES WHERE A RIGHT TO MANUFACTURE IS REFERABLE TO THE SAME PATENT OR PATENTS AND IS A PART OF THE CONTRACT, IS LEGAL.

IN WHICH THE INDUSTRIAL TRUSTS WERE LITIGANTS,
DECIDED TO APRIL 1ST, 1909,

Am. Brake Shoe & Fdy. Co.
(N. J. 1902. \$5,500,300)
against
Western Iron & Steel Co.

Am. Brake Shoe & Fdy. Co.
against
Railway Materials Co.

Patent No. 423,990.
For improvements in brake shoe.

Am. Can Co.	Patent Nos. 436,792, 365,316, 598,567.
(N. J. 1901 \$88,000,000)	Can body making machines, can cap
against	soldering machines and can body
Hickmott Asparagus Canning Co.	machines.

Am. Can Co.	Patent Nos. 436,792, 365,316, 598,567.
against	Can body making machines, can cap
Hickmott Asparagus Canning Co.	soldering machines and can body
	machines.

Am. Can Co.
against
Morris.

Patent Nos. 539,366 and 543,347.
Lock seam can.

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Am. Caramel Co.
(1898 Penn. \$2,550,000)
against
Quaker City Choc. & Confec. Co.

Patent No. 532,554.
Machine for cutting candy.

DECISION. June 8, 1905. Void for lack of patentable invention.

Am. Caramel Co.
against
Thomas Mills & Bro.

Patent No. 532,554.
For a machine for cutting candy.

DECISION. June 8, 1905. Void for lack of patentable invention.

Am. Caramel Co.
against
Thomas Mills & Bro.

Patent No. 532,554.
Machine for cutting candy.

DECISION. Dec. 3, 1906. The Hershey patent No. 532,544 for a machine for cutting candy covers a combination which was new, although the elements were old, and discloses patentable invention; the machine being of greater efficiency than any of the several which preceded it in the art. Also held, valid as against the claims of prior public use, and infringed.

Am. Graphophone Co.
(W. Va. 1887. \$3,700,000.)
against
Am. Record Co.

Patent No. 688,739.
For method of producing sound records.

DECISION. Jan. 14, 1907. Held infringed.

Am. Graphophone Co.
against
Universal Talking Machine Co.

Patent No. 688,739.
For method of producing sound records.

DECISION. Jan. 14, 1907. Held infringed.

Am. Grass Twine Co.
(Del. 1899. \$15,000,000.)
against
Choate.

Patent Nos. 412,963 & 646,123.
For a grass twine for use in harvesters to bind grain. For fabric consisting of a main body portion formed of parallel layers or strands of twisted grass.

DECISION. Nov. 15, 1907. 412,963 void. 646,123 void for lack of invention.

Am. Grass Twine Co.
against
Choate.

Patent No. 524,433.
For an automatic feeder for twine making machines.

DECISION. Nov. 15, 1907. Is merely for an adaption of old elements for use in connection with a machine for making grass twine, and must be limited to the particular form of adaption shown. Neither such patent nor patent No. 654,991 for a machine for making grass twine, is infringed by the machine of the Monohan & Kieren patent No. 785,070. Not infringed.

DECISION. Feb. 15, 1898. As construed and limited by prior adjudication, held not infringed.

Am. Type Founders Co.
against
Damon & Peets.

Patent No. 36,905.
A design for font of type.

DECISION. Nov. 10, 1905. Void for lack of patentable invention and because it shows no such peculiar configuration or ornamentation as to authorize a design patent.

Am. Soda Fountain Co.
(N. J. 1891. \$3,750,000.)
against
Green.

Patent No. 414,272.
Soda water fountains.

DECISION. June 4, 1895. The allegations that plaintiff was a trust constituted no defence and were irrelevant and immaterial.

Am. Soda Fountain Co.
against
Green.

Patent No. 414,272.
For improvement in dispensing apparatus for soda water.

DECISION. June 11, 1896. Claim 2 held valid and infringed.

Am. Soda Fountain Co.
against
Green.

Patent No. 414,272.
For improvement in dispensing apparatus for soda water.

DECISION Jan. 18, 1897. Claim 2 held void reversing decision of June 11, 1896. Verdict for defendant.

Am. Soda Fountain Co.
against
Zwietusch.

Patent No. 11,313.
Improvements in soda water fountains.

DECISION. Aug. 8, 1896. Void for unwarranted enlargement of the claims.

Am. Soda Fountain Co.
against
Zwietusch.

Patent No. 11,313.
Improvements in soda water fountains.

DECISION. Jan. 3, 1898. Void for unwarranted enlargement of the claims.

Am. Stove Co.
(N. J. 1901. \$5,750,000.)
against
Cleveland Foundry Co.

Patent No. 475,401.
For an oil burner.

DECISION. Jan. 22, 1908. Claim 1, was not anticipated, and construed in the light of the specification and drawings is valid for the apparatus therein described.

Arrott
against
Standard Sanitary Mfg. Co.

Patent No. 633,941.
Dredger for pulverulent material.

DECISION. July 1, 1904. Valid and infringed.

Arrott
against
Standard Sanitary Mfg. Co.

Patent No. 633,941.
Dredger for pulverulent material.

July 1, 1904. Affirming above.

Brunswick-Balke Collender Co.
(N. J. 1902. \$25,000,000.)
against
Brunswick.

Patent No. 203,108.
For billiard tables.

DECISION. Aug. 15, 1889. Letters patent No. 203,108 for billiard tables is not infringed by the manufacture of tables under letters patent No. 119,262 since the tables described in the two patents are not only materially different, but also operate differently.

Brunswick-Balke Collender Co.
against
Phelan Billiard Ball Co.

Patent No. 228,879.
For pool-ball frame.

DECISION. Feb. 23, 1897. Void.

Brunswick-Balke Collender Co.
against
Phelan Billiard Ball Co.

Patent No. 288,879.
For a pool-ball frame.

DECISION. April 7, 1896. Void as being the result of mere mechanical skill.

Brunswick-Balke Collender Co.
against
Klumpp.

Patent No. 623,933.
For improvements in bowling alleys.

DECISION. May 19, 1904. Consent decree obtained, valid and infringed.

Brunswick-Balke Collender Co.
against
Klumpp.

Patent No. 599,557.
For improvements in bowling apparatus.

DECISION. May 17, 1904. Claim 1 for an improvement in bowling apparatus, which consists of a specially constructed runway for the return of the balls, since the filing of a disclaimer of the feature of using a double incline, is void on its face, for lack of patentable invention.

Brunswick-Balke Collender Co.
against
Klumpp.

Patent No. 623,933.
For a bowling alley.

DECISION. July 24, 1903. Held not to show patentable invention, on a motion for preliminary injunction.

Brunswick-Balke Collender Co.
against
Klumpp.

Patent No. 599,447.
For an improvement in bowling apparatus.

DECISION. Oct. 28, 1903. Claim 1 for an improvement in bowling

apparatus, which consists of a specially constructed runway for the return of the balls, since the filing of a disclaimer of the feature of using a double incline is void on its face for lack of patentable invention.

Brunswick-Balke Collender Co.
against
Thum.

Patent No. 599,477.

DECISION. Nov. 18, 1901. Sustained and held infringed.

Brunswick-Balke Collender Co.
against
Rosatto.

Patent Nos. 623,933 and 554,611.
For bowling alley. Ball runway.

DECISION. Feb. 21, 1908. Wiggins Patent No. 623,933 for bowling alley, void. Wiggins Patent No. 554,611 ball runway, void.

Brunswick-Balke Collender Co.
against
Rosatto.

DECISION. Nov. 12, 1908. Affirming above.

Brunswick-Balke Collender Co.
against
Wagner & Adler Co.

Patent Nos. 553,185, 556,532, 559,790.

DECISION. May 3, 1907. Cunningham patents 553,185, 556,532 held not infringed. 559,790 held void. Verdict for defendants.

Celluloid Company.
(N. J. 1890. \$3,000,000.)
against
Arlington Mfg. Co.

Patent Nos. 546,360 & 542,452.
For production of imitation onyx
from pyroxylic compounds, and for
improvement in celluloid articles.

DECISION. Feb. 15, 1898. Valid and infringed.

Chicago Pneumatic Tool Company
(N. J. 1901. \$10,000,000.)
against
Cleveland Penn. Tool Co.

Patent No. 537,629.
For a pneumatic tool.

DECISION. Jan. 15, 1897. Decree for complainants.

Cons. Car Heating Co.
(N. Y. 1900. \$8,500,000.)
against
Am. Elec. Heating Corp.

Patent No. 500,288.
For an electrical heater.

DECISION. Aug. 25, 1897. Covers a novel, useful and patentable invention. The second claim is infringed by a construction in which the

coil and the non-conducting material between the adjacent layers of the coil are built solidly on one piece.

Cons. Car Heating Co.
against
Gold Car Heating Co.

Patent No. 500,288.
For an electrical heater for street
railway cars.

DECISION. May 26, 1898. Held valid and infringed.

Cons. Car Heating Co.
against
Gold Car Heating Co.

Patent No. 500,288.
For an electrical heater for street
railway cars.

DECISION. May 26, 1898. Held valid and infringed.

Cors. Car Heating Co.
against
Martin Anti-Fire Car Heater Co.

Patent No. 363,553.
For an improvement in hose coup-
lings.

DECISION. Jan. 20, 1896. Was not anticipated, and its claims are infringed by a coupler made in accordance with the Martin patent of Sept. 11, 1894.

Cors. Car Heating Co.
against
West End St. Ry. Co.

Patent No. 500,288.
For an electrical heater for street
railway cars.

DECISION. Feb. 18, 1898. Construed and held valid, and infringed as to both its claims.

Diamond Match Co.
(Ill. 1889. \$15,000,000.)
against
Adirondack Match Co.

Patent 313,064.
For an improvement in apparatus for
dipping matches.

DECISION. Jan. 31, 1895. The U. S. patent does not cease when a foreign patent ceases because of non-payment of patent office fees for more than a part of the term for which the patent might on payment of all the fees, remain in force.

Diamond Match Co.
against
Hanover Match Co.

Patent 281,408.
Machine for bundling match sticks.

DECISION. Jan. 15, 1897. Decree for complainants.

Diamond Match Co.
against
Ohio Match Co.

DECISION. April 16, 1897. A bill which fails to show that the invention of the patent sued on was not patented or described in some printed publication in this or some foreign country prior to the patentees' alleged invention thereof, is demurrable.

Diamond Match Co.
against
Oshkosh Match Co.

DECISION. Oct. 1, 1894. That the fact that an application for a patent on one of the defendant's machines was pending was no ground for denying the order, the rule of secrecy in the patent office having no application to investigations of causes by the courts.

Diamond Match Co.
against
Schenck.

Patent No. 483,166.
For a friction match device.

DECISION. Dec. 30, 1895. Held valid and infringed.

Diamond Match Co.
against
Union Match Co.

Patent No. 389,435.
For a machine for making matches.

DECISION. April 23, 1904. A preliminary injunction denied on the proofs.

Diamond Match Co.
against
Ruby Match Co.

Patent No. 389,435.
For a machine for making matches.

DECISION. Jan. 13, 1904. Claims 4 and 14 construed, and held infringed by machine made in accordance with the Kelly patents No. 592,605 and reissued patent No. 10,573. Claims 17 held not valid or infringed.

Eastman Kodak Co.
against
Anthony & Scovill Co.

Patent No. 539,713.
For a photographic film roll.

DECISION. April 4, 1906. Void for lack of patentable invention, in view of the prior art.

Eastman Kodak Co.
against
Anthony & Scovill Co.

Patent No. 539,713.
For a photographic film roll.

DECISION. June 30, 1907. Of April 4, 1906, affirmed.

Electric Storage Battery Co.
against
Gould Storage Battery Co.

Patent No. 430,868.
For a regulating system for electric circuits.

DECISION. Aug. 24, 1907. Construed and held valid, as disclosing a patentable improvement on the devices of the prior art, but, as limited by its terms, not infringed.

National Casket Co.
(N. Y. 1899. \$6,000,000.)
against
Stoltz.

Patent No. 619,567.
Face plate for coffins.

DECISION. Jan. 12, 1905. Void.

National Casket Co.
against
Stoltz.

Patent No. 619,567.
Face plate for caskets.

DECISION. Jan. 2, 1904. Did not involve invention. Void.

National Casket Co.
against
Stoltz.

Patent No. 619,567.
Face plate for caskets.

DECISION. Nov. 7, 1907. Held void for prior use on evidence establishing beyond reasonable doubt that such face plates of cotton and silk illusion had in numerous instances been used many years before the application for the patent was filed.

Natl. Enameling & Stamping Co.
(N. J. 1899. \$30,000,000.)
against
New England Enameling Co.

Patent No. 527,361.
For an improvement in enameling
metal ware.

DECISION. Dec. 4, 1906. Claims 1, 2 and 3 were invalid; 4, 5, 6, 7 and 8 were valid and infringed; and claims 9, 10, 11 and 12 were not infringed.

Natl. Enameling & Stamping Co.
against
New England Enameling Co.

Patent No. 527,361.
For an improvement in enameling
metal ware.

DECISION. Mar. 1, 1907. Held void as to claims 1, 2 and 3 and not infringed as to claims 9, 10, 11 and 12.

N. Y. Air Brake Co.
against
Westinghouse Air Brake Co.

Patent No. 360,070 and 376,837.
For improvements in air brake
mechanism.

DECISION. May 28, 1895. The Westinghouse air-brake patent No. 360,070 held infringed as to claims 1, 2 and 4. A decree granting a preliminary injunction against the infringement of claim 1 of the Westinghouse air-brake patent, No. 376,837 reversed on the ground that the question of the infringement was too doubtful to be resolved in favor of complainant on a motion for preliminary injunction.

Otis Elevator Co.
(N. J. 1898. \$13,000,000.)
against
Portland Co.

Patent No. 453,955.
For an elevator controlling mechanism.

DECISION. Dec. 1, 1903. Claims 1 and 2 void for double patenting, that being an inherent feature of the device of the prior patent No. 359,551, to the same patentee.

Otis Elevator Co.
against
Portland Co.

Patent No. 453,955.
For an elevator controlling mechanism.

DECISION. Jan. 14, 1903. Claims 1 and 2 can not be given a broad construction as embodying a general invention since in that case, if not anticipated they would cover the device of the prior patent, 359,551 and would be void for double patenting of the invention and the invention of the latter patent must be restricted substantially to the specific combination shown in claims 3 and 4 as so construed. Claims 1 and 2 held not infringed.

Otis Elevator Co.
against
Geiger.

DECISION. Mar. 30, 1901. In an action for the infringement of elevator patents, a private defendant was not entitled to urge as a defense that the plaintiff was a corporation organized merely for the purpose of holding the legal title to various elevator patents alleged to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engaging in the manufacture and sale of such appliances in violation of the Sherman Anti-trust law (26 Stat. 209) since until the United States has acted and sought to prosecute the plaintiff for violation of such act, an infringer of the plaintiff's patent will not be permitted to raise such issue as a defence thereto.

Penn. Steel Co.
against
Vermila.

Patent No. 248,990.
For an improvement in railway switches.

DECISION. Nov. 28, 1898. Discloses patentable invention. The claim is infringed by a device made according to patent No. 308,373, which merely shows a variation in the form of the jaws.

Penn. Steel Co.
against
Pettibone, Mulliken & Co.

Patent No. 498,196.
For an improvement in railroad switch stand.

DECISION. Oct. Term, 1905. Not infringed.

Sample
against
Am. Soda Fountain Co.

Patent No. 498,962.
For draft tube for soda water fountains.

DECISION. May 16, 1904. Void for lack of patentable novelty.

Sample
against
Am. Soda Fountain Co.

Patent No. 498,962.
For improvement in draft tubes for soda water fountains.

DECISION. April 27, 1905. Valid, and the defendant, The American Soda Fountain Company had infringed these claims.

Standard Sanitary Mfg. Company,
(N. J. 1899. \$6,757,000.)

Standard Sanitary Mfg. Co.
against
Mott.

Patent 633,941.
Dredger for pulverulent material.

DECISION. July 1, 1904. Held valid and infringed.

Standard Sanitary Mfg. Co.
against
Mott.

Patent 633,941.
Dredger for pulverulent material.

DECISION. July 1, 1904. Above affirmed.

Union Switch & Signal Co.
(Penn. 1882. \$2,000,000.)
against
Atlantic City V. Co.

A preliminary injunction should not be granted where the patents in suit have not before been judicially considered and involve complication apparatus in respect to which the experts, testifying by affidavit, differ radically, both in matters of opinion and matters of fact and where the question of infringement depends largely upon the construction to be given to the claims in view of the prior state of the art.

Union Switch & Signal Co.
against
Johnson Railroad Signal Co.

Patent No. 284,716.
For improvements in railroad signals.

DECISION. Nov. 16, 1892. A licensee to "make and use" a patented article is not a necessary party complainant in a bill brought by the owner of the patent for infringement.

Union Switch & Signal Co.
against
Johnson Railroad Signal Co.

Patent No. 216,510.
For improvements in interlocking railroad switches and signals.

Sept. 26, 1893. 216,510 for improvements in interlocking railroad switches and signals. Not infringed.

Union Switch & Signal Co.
against
Phila. & R. R. Co.

Same as Union Switch & Signal Co. v. Atlantic City v. Co.

Union Switch & Signal Co.
against
Phila. & R. R. Co.

Patent Nos. 233,746 and 246,492.
For electric railway signaling apparatus.

DECISION. Sept. 13, 1899. Not infringed. 227,102 for an improved connector for electric track circuits, not infringed. 270,867 for improvements in electric circuits for railway signalling is void. 273,377 for a connector for electric track circuits construed and held not infringed.

Union Switch & Signal Co.
against
Phila. & R. R. Co.

Patent No. 270,867.
For improvements in electric circuits
Patent Nos. 233,747 & 246,492.
For electric railway apparatus.
Patent Nos. 227,102 & 273,377.
For improved connector for electric track circuits.

DECISION. May 26, 1896. Pat. No. 270,867 for improvements in electric circuits for railway signalling, void, 233,746 and 246,492 for electric railway signaling apparatus, not infringed. 227,102 and 273,377 for improved connector for electric track circuits, construed and held not infringed, the former as to claim 1, and the latter as to claim 6.

United States Envelope Co.
(Me. 1898. \$70,000,000.)
against
Sherman Envelope Co.

Patent No. 420,792.
For improvements in machines for making envelopes.

DECISION. April 28, 1908. The Heywood Patent No. 420,792 for improvements in machines for making envelopes, claims 14 and 15 which relate to mechanism for discharging the completed envelope from the folding box, are limited to the specific mechanism shown, the essential feature of which is the mounting of the flap folder on a movable support, by means of which it is raised after the folding operation leaving an aperture through which the envelope is discharged. As so construed, such claims are not infringed by the machines of the Sherman patents, Nos. 648,674 and 672,919.

United States Glass Co.
(Penn. 1891. \$6,000,000.)
against
Atlas Glass Co.

Patent No. 260,819.
For an improvement in the method of mfg. glassware.

DECISION. April 13, 1898. Construed and held not infringed.

United States Glass Co.
against
Atlas Glass Co.

Same as above.

DECISION. Dec. 6, 1898. Affirming above.

United States Playing Card Co.
(N. J. 1894. \$133,380,000.)
against
Spalding.

DECISION. Feb. 24, 1899. Motion to punish for contempt denied.

United States Playing Card Co.
against
Spalding.

DECISION. Feb. 28, 1899. Motion for preliminary injunction denied without prejudice.

United States Playing Card Co. Patent 525,941.
against For an apparatus for playing dupli-
Spalding. cate whist.

DECISION. Nov. 23, 1898. Held valid and infringed as to claims 1, 2 and 4.

United States Printing Co. For an improvement in a machine
(Ohio 1891. \$3,500,000.) for printing playing cards.
against
Am. Playing Card Co.

DECISION. July 26, 1895. Held valid and infringed.

United Shoe Mchy. Co. Patent No. 461,793.
(N. J. 1899. \$25,000,000.) Method of forming chain stitch.
against
Caunt.

DECISION. Dec. 26, 1904. Held infringed on application for preliminary injunction.

United Shoe Mchy. Co.
against
Duplessis Independent Shoe Co.

DECISION. Act. March 3, 1897, c 395,29 Stat. 695 (U. S. Comp. St. 1901 p 589) providing that suits in Circuit Courts for infringements of patents shall be brought only in "the district in which the defendant is an inhabitant, or in any district in which the defendant whether a person, partnership or corporation, shall have committed acts or infringement and have a regular and established place of business" applies only to defendants who are inhabitants to some district within the U. S. and does not effect patent suits against aliens, which may be brought in any district where the defendant may be found.

United Shoe Mchy. Co. Patent No. 364,217.
against For an improved mold for molding
Greene. the heels of boots.

DECISION. April 7, 1902. Covers a meritorious, practical, and useful improvement in the art which was not anticipated, and discloses patentable invention.

United Shoe Mchy. Co.
against
Greenman.

Patent No. 672,056.
For a clutch for starting and stopping
machines.

DECISION. Mar. 27, 1907. Void for anticipation by the clutch previously employed in the Stiles-Thompson machine for setting lacing studs in shoes.

United Shoe Mchy. Co.
against
Duplessis.

Patent No. 412,704.
For invention for sewing machines.

DECISION. Aug. 2, 1907. Not infringed.

Union Waxed & Parchment Paper Co.
(N. J. 1900. \$20,000,000.)
against
Sevigne Bread Wrapper Co.

DECISION. May 22, 1905. That defendants are exploiting a collusive decree adjudging the validity of patent which is in fact invalid does not entitle a third person, not a party to such decree, nor bound thereby, to have the same set aside, after several terms of court have elapsed and be admitted to defend the suit, nor to injunctive relief against such exploitation.

SUMMARY OF LITIGATED CASES.

The above cases were not selected with reference to the results of the litigation so a summary of the entire number may be instructive.

In thirty-one cases the patents were declared void; in twenty-one cases the patents were declared not infringed and in twenty-seven cases the patents were declared valid and infringed. In about thirty-three and a third per cent of the cases therefore, the verdict was in favor of the owner of the patents involved.

Asceltine Lake + Co.